Nos. 19,373 and 19,374

United States Court of Appeals

For the Ninth Circuit

JOSEPH A. MAUN, as trustee, 1962 trust for Alys Wunderlich Bachler, TOWN OF WOODSIDE, et al., *Appellants.* vs. UNITED STATES OF AMERICA, *Appellee.*	No. 19,373
WILLIAM J. ADAMS and JANET K. ADAMS, et al., *Appellants,* vs. UNITED STATES OF AMERICA, *Appellee.*	No. 19,374

Appeal from the United States District Court for the Northern District of California, Southern Division

BRIEF FOR THE UNITED STATES, APPELLEE

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APPELLEE'S BRIEF

INTRODUCTION

For some unknown reason counsel for appellants have persisted in an attempt to cast an aura of confusion around the basic issue determined below and, a fortiori, involved in this appeal. It will be recalled that appellants' Petition for Permission to Appeal (filed in this Court on June 29, 1964) stated that the

controlling question of law involved in the Order of the District Court below was:

> Whether or not a proposed taking in the two pending actions would violate the provisions of the Fifth Amendment to the Constitution of the United States because the proposed taking is not for public use?

Appellants' Petition also contained several pages devoted to a discussion of "procedural contentions" wherein appellants urged as error that portion of the District Court's Order which struck their Motions for Summary Judgment and Dismissal (Pet. 9-11). Appellee filed an Answer to appellants' Petition (Filed in this Court on July 10, 1964) wherein counsel for appellee was compelled to state that appellants' Petition presented a "wholly inaccurate and misleading picture of the case below" (Answer 3). Appellee's Answer then proceeded to present what is believed to be an accurate statement of the case below and of the issue and controlling question involved in the District Court's Order (Id. at 11-12). The Answer also discussed appellants' contentions concerning "procedural" errors and it was demonstrated therein that said contentions were not supported either by the record or the authorities to which appellants referred (Id. at 14-16).

Appellants have now filed their opening brief and counsel for appellee were hopeful that the prior confusion concerning the issue involved below and that which is to be determined in this appeal would be clarified. Much to our surprise, however, we find

that appellants' brief, rather than clarifying the matter, actually compounds the confusion! First of all, contrary to counsel for appellants' Certification of Compliance (Br. 30), there has been no compliance with Section (d) of this Court's Rule 18 in that nowhere in appellants' brief is there set forth a list of what appellants *currently* allege to be specifications of error. It is also surprising to find that appellants' brief states that the controlling questions of law are *now* alleged to be (Br. 2):

> Does the AEC have power to determine the character and location of an electric power line used in local distribution or for the transmission of electricity in intrastate commerce?
>
> Does the AEC's lack of power to determine the character and location of an electric transmission line used in local distribution or for the transmission of electricity in intrastate commerce prevent the United States from condemning property for such use at the Commission's request?

Although appellants' brief contains no arguments or authorities concerning their so-called "procedural contentions," we find allegations in their Statement of the Case (Br. 3) and in their Conclusion (Br. 29) wherein it appears that they continue to urge them as part of this appeal. This aura of confusion is further expanded by appellants in that we also find other "issues" sprinkled liberally throughout their brief. For example, their brief contains: (a) a discussion of the alleged desirability and practicality of constructing the transmission line in question underground rather than overhead (Br. 13-16; 22-25) and,

(b) a few vague remarks and conclusions concerning the authority of the Court to determine whether the proposed use of the easement condemned is, in fact, a "public use" (Br. 27-28).

This is an extraordinary appeal under 28 U.S.C. 1292 (b), the interlocutory appeal statute, and as such it would seem clear that the only issue or question before this Court is that which was certified by the District Court. Counsel for appellee are of the firm belief that the District Court's Order and the record in this matter, as supplemented by the discussion and authorities in our Answer to appellants' Petition for Permission to Appeal, unequivocally establishes that the sole issue and question of law to be determined in this Section 1292(b) appeal is: "Whether or not the provisions of 42 U.S.C. Section 2018 limits the authority of the Atomic Energy Commission to condemn the easement here in question and to construct thereon an electrical transmission line contrary to local ordinances." In this belief then, counsel for appellee have devoted this brief to a consideration and discussion of this sole issue.

JURISDICTION

This consolidated appeal consists of two eminent domain proceedings instituted in the District Court below by the United States at the request of the Atomic Energy Commission (hereinafter referred to as AEC), pursuant to 28 U.S.C. Section 1358. On

June 12, 1964, the District Court granted appellee's motion to strike: (1) all defenses and objections raised in appellants' Answers, and (2) their Motions for Summary Judgment and for Dismissal (R. Vol. 1a 84; Vol. 1b 33).[1] This Order was amended on June 17, 1964 to include a recitation which would permit a petition to this Court under the provisions of 28 U.S.C. Section 1292(b) (R. Vol. 1a 86; Vol. 1b 35). Subsequently, on July 23, 1964, this Court granted appellants' Petition for interlocutory appeal, pursuant to the aforesaid 28 U.S.C. Section 1292(b) (R. Vol. 1a 90; Vol. 1b 42).

QUESTION PRESENTED

Contrary to the position taken by appellants, appellee, as hereinabove noted, contends that the sole issue and question presented in this appeal is:

Whether or not the provisions of 42 U.S.C. Section 2018 limits the authority of the Atomic Energy Commission to condemn the easement here in question and to construct thereon an electrical transmission line contrary to local ordinances (R. Vol. 1a 84-85; Vol. 1b 33-34).

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[1]There are physically three volumes of transcript of record for the cases involved in this appeal. Unfortunately, however, two volumes are designated "Volume One," one each for proceeding Numbers 19,373 and 19,374. Volume Two is the reporter's transcript of certain consolidated hearings before the Court below. Wherefore, in order to avoid confusion herein, Volume One of Number 19,373 shall be referred to as Volume 1a, and Volume One of Number 19,374 shall be referred to as Volume 1b.

STATEMENT OF THE CASE

Although appellants' present Statement of the Case is quite different from that which was set forth in their Petition for Permission to Appeal (Pet. 1-5), it is submitted that appellants still have not presented an accurate and complete statement of the facts of this case. Counsel for appellee, therefore, finds that we cannot subscribe to the current Statement of the Case set forth in appellants' brief and must once again[2] set forth what we believe to be a more factual and accurate statement of the case below.

On May 13, 1960 (74 Stat. 120), Congress authorized an AEC research project known as the Stanford Linear Accelerator Center (hereinafter referred to as SLAC), and the sum of $114 million dollars was subsequently authorized for the construction thereof; and it is currently nearing completion on the campus of Stanford University (Act of Sept. 26, 1961, 75 Stat. 676). Since this AEC project is intended and designed for basic *research* in high energy physics and not as a plant for the production of electrical energy by nuclear means, one of the essential requisites is the availability of a sufficient quantity of conventionally generated electricity to operate the complex equipment to be installed in this project. Consequently, on January 10, 1963, AEC entered into a contract with the Pacific Gas and Electric Company (hereinafter referred to as PG&E), the local utility com-

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[2]As we were forced to do in our Answer to appellants' Petition.

pany.[3] Pursuant to the terms of this contract, PG&E was to furnish the necessary power to SLAC and, incident thereto, undertook to construct, operate and maintain certain overhead transmission lines from its closest feeder line to SLAC (Ibid.). PG&E then proceeded to apply for the appropriate construction "use permits" from the County of San Mateo and the Town of Woodside.[4]

At this time neither the County of San Mateo nor the Town of Woodside had an ordinance which required such transmission lines to be placed underground; nevertheless, PG&E was met with demands that the line be placed underground as a condition to the issuance of the necessary use permits (Ibid.). It was soon apparent that such an underground transmission line would not be as serviceable or desirable to either PG&E or AEC from a service point of view and that it would also entail an additional cost of several millions of dollars over and above the estimated cost of an overhead line (Id. at 33). The continuing demand that the line be placed underground led to many conferences between the interested parties, with several plans and suggestions being exchanged, all without benefit of mutual agreement. The controversy reached such proportions that on January 29, 1964, the Joint Committee on Atomic Energy of the United States Congress conducted a full and complete

[3]See Letter of March 7, 1964 from the Chairman of AEC to the Mayor of the Town of Woodside (R. Vol. 1a 32).

[4]Contrary to the allegation of appellants at page 6 of their Brief, PG&E was at no time acting as agent for AEC but was acting solely in its capacity as a local utility company (Ibid.).

hearing concerning this problem (Hearing before the Joint Committee on Atomic Energy on Stanford Accelerator Power Supply, 88th Cong., 2nd Sess., Jan. 29, 1964).

By letter of March 7, 1964 the Chairman of AEC notified the County of San Mateo and the Town of Woodside that, although AEC was willing to attempt to find a mutually agreeable solution to this problem, time was of the essence since SLAC was nearing completion (Ibid.). The Chairman went on to say that if PG&E was unable to obtain the necessary use permits to enable it to perform its contractual obligation and construct the transmission line, AEC would be forced, in the national interest, to intervene directly by instituting eminent domain proceedings and to construct their own line (Id. at 37-38). In spite of the foregoing, PG&E was subsequently denied use permits by the Town of Woodside and the County of San Mateo.[5] On March 9, 1964, the Town of Woodside passed a "Temporary Interim Zoning Ordinance" prohibiting the construction within the town boundaries of overhead transmission lines in excess of 50,000 volts (R. Vol. 1a 14). On March 24, 1964, at the request of AEC, a Complaint in Condemnation was filed in the Court below condemning, in essence, a 100 foot wide easement over approximately 4.92 acres of land located within the boundaries

[5]It is to be noted that the County of San Mateo Planning Commission had previously granted PG&E a conditional use permit that was subsequently revoked by the Town of San Mateo Board of Supervisors (R. Vol. 1a, Minutes, Board of Supervisors of San Mateo County, April 21, 1964, marked "Exhibit F" following page 74 of Record).

of the Town of Woodside (R. Vol. 1a 1). This Complaint was followed by a Declaration of Taking on April 30, 1964 (R. Vol. 1a 47). Also on April 30, 1964, a second condemnation action was instituted and a Complaint and Declaration of Taking were filed condemning the remainder of the easement consisting of approximately 24.57 acres located within the County of San Mateo but outside the boundaries of the Town of Woodside (R. Vol. 1b 1 and 10).

In the light of prior events, counsel for the Government were aware that certain objections would undoubtedly be interposed to these condemnation proceedings. Wherefore, concurrently with the filing of the Declarations of Taking aforesaid, Government counsel appeared before the Honorable Lloyd H. Burke, District Judge, and requested that the Government be granted modified Orders of Possession limited to permission for AEC and/or its agents to conduct field surveys and design inspections; which Judge Burke granted (R. Vol. 1a 57; Vol. 1b 22). Government counsel also suggested, for the purpose of eliminating unnecessary repetition, that time should be allowed for service upon all the named defendants and for an opportunity for those who desired to file whatever objections to the taking they thought necessary and proper; and, that thereafter all objections and motions filed in both cases be consolidated and heard at one time. The Court and counsel for appellants, who were present during this hearing, agreed to the suggestion and a hearing was set for June 4, 1964.

As anticipated, a number of landowners did raise objections to the taking and the following documents and motions were filed in the Court below prior to June 4, 1964, by the defendants specified.[6]

In Civil 42214 (This Court's Number 19,373):

(1) Answers and Motions to Dismiss, by Defendants:

(a) Howell C. and Edith M. Jones, filed April 14, 1964, as to Tract 109E (R. Vol. 1a 19).

(b) Town of Woodside, filed April 14, as to all property described in this proceeding by reason of taxes and assessment liens on said properties (R. Vol. 1a 8).

(c) Jane F. Carrigan, filed May 7, 1964, as to Tracts 108E-2 and E-3 (R. Vol. 1a 58).

(d) Joseph A. Mann, trustee, filed May 21, 1964, as to Tract 105E-2 (not in transcript of record).

(e) Charles Savage and Ethel M. Savage, filed April 14, 1964, as to Tract 110E (R. Vol. 1a 23).

(2) Notice of Motion to Dismiss and Memorandum in Support Thereof, filed April 14, on behalf of the above named defendants (R. Vol. 1a 27).

(3) Notice of Motion for Summary Judgment and Memorandum of Points and Authorities in

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[6]It should be noted that not all of the landowners involved in these proceedings have objected to the taking; and there are, therefore, several landowners who are ready to proceed with a determination of just compensation.

Support Thereof, on behalf of the above named defendants, filed May 25, 1964 (R. Vol. 1a 62).

In Civil 42323 (This Court's Number 19,374):

Answers and Motions to Dismiss, filed by defendants:

(a) William J. and Janet K. Adams, and Donald H. and Lois N. Scofield, filed on May 20, 1964, as to Tract 104E (R. Vol. 1b 23).

(b) Joseph A. Maun, trustee, filed on May 21, 1964, as to Tract 105E-1 (R. Vol. 1b 28).

Since the objecting defendants were essentially represented by the same counsel, it was not surprising to find that the objections and alleged defenses raised were substantially identical and may be summarized as follows:

(1) AEC is not authorized to condemn for the purposes stated in the Complaint.

(2) AEC is attempting to violate certain local ordinances pertaining to electrical transmission lines, and they are precluded from doing so by 42 U.S.C. Section 2018.[7]

(3) AEC has not conformed to the requisites of aforesaid ordinances and are not, therefore, entitled to use the easements for the purposes stated.

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[7]In appellants' Statement of the Case, it is alleged that their defenses below were predicated upon Section 2018 *and* upon the Federal Power Act of 1935 (Br. 4). The Record does not support this allegation.

(4) AEC's proposed use of the easement condemned is unlawful in that it violates the aforesaid ordinances and is, therefore, a non-public use.

(5) AEC has not been appropriated funds for the purpose of this condemnation and/or the construction or the facilities to be constructed upon the easement taken.

(6) AEC has not been authorized to engage in the transmission of electrical power in these circumstances.

On June 3, 1964, appellee filed a Motion to Strike: (1) defendants' Motion to Dismiss and for Summary Judgment, and (2) all alleged defenses or objections to the taking raised in defendants' Answers (R. Vol. 1a 81). Attached to said Motion was a comprehensive Memorandum of Points and Authorities in support thereof.

At the request of the Court, there was a one-day continuance for the hearing, and on June 5th, oral argument was presented before the Honorable Albert C. Wollenberg, District Judge. During the hearing, Judge Wollenberg attempted to simplify the issues to be decided and, in so doing, he stated initially that he was convinced by the authorities cited in the Government's memorandum that Rule 71A(e) F.R.Civ.P. clearly precluded any pleading or motion by defendants other than an answer. He, therefore, granted the Government's Motion to Strike the Defendants' Motions to Dismiss and for Summary Judgment (R. Vol. 1a 84; Vol. 1b 33; Vol. 2, 12). In doing so,

however, he noted that defendants were not prejudiced in that the objections raised in defendants' Motions to Dismiss and for Summary Judgment were merely repetitions of those raised in their Answers, and that these issues were now before the Court on the Government's Motion to Strike (R. Vol. 2, 10 through 13). Having resolved this rather incidental procedural matter, Judge Wollenberg then directed his attention to ascertaining the basic issues sought to be raised by the objecting defendants.

After discussion between counsel and the Court, it was agreed that there was really no contention by defendants that AEC did not have the general authority and appropriations to condemn, nor that the use of the facility in question was not a public one; it was also agreed that the really basic issue was whether AEC was precluded by 42 U.S.C. 2018 from condemning the easements in question and constructing an electrical transmission line thereon, contrary to local ordinances (R. Vol. 2, pp. 14, 15, and 41). It was to this issue Judge Wollenberg referred when he ruled on June 12th that:

> Plaintiff's motion to strike all defenses and objections in defendants' answer is also granted. This Court has concluded Congress did not intend 42 U.S.C. 2018, *upon which defendants ground their defenses,* to prevent the AEC from condemning the easement in question. Under the circumstances of this case, the Court has further concluded that plaintiff has not violated any rights of defendants by such taking. (R. Vol. 1a 85, emphasis added)

Subsequently, on June 16th, counsel for the objecting defendants and for the Government appeared before Judge Wollenberg again and the Government requested, and the Court granted, an Order giving the Government complete possession of the easement concerned, to the extent of the estate condemned (R. Vol. 1a 88). Counsel for the Government further informed the Court that counsel for defendants had made public statements to the effect that, in spite of the Court's ruling, the Town of Woodside would arrest anyone attempting to construct this line. The Government requested the Court to issue an order restraining defendants and/or their agents from interfering with the Government's possession of this easement (R. Vol. 2, pp. 56 and 57). Mr. Austin Clapp, who was representing the objecting defendants during this hearing, confirmed this threat in open court, but went on to state that all the defendants desired was to seek a means to obtain appellate review of the Government's right to condemn. Mr. Clapp stated, however, that if the Court would amend his June 12th Order to include a 28 U.S.C. 1292(b) recitation, the arrest would not be necessary (R. Vol. 2, p. 65). On June 17th the Court below amended its June 12th Order to include a 1292(b) recitation (R. Vol. 1a 86), and on June 26th Mr. Clapp filed his Petition in this Court. Appellee filed an answer to appellants' Petition on July 10, 1964, and this Court issued its Order granting leave to appeal on July 22, 1964. It should also be mentioned that even though defendants Jane F. and James Carrigan objected below and did in fact file a

Notice of Appeal, on October 1, 1964 these defendants moved for and were granted an order allowing them to withdraw their appeal.

ARGUMENT

INTRODUCTION

Prior to a discussion of the merits on the issue here involved it was felt that a few preliminary comments were needed.

Appellee recognizes that a strong argument could undoubtedly be advanced to the effect that appellants' arguments concerning the alleged limitations of Section 2018 are premature and improper in this condemnation proceeding. Certainly appellants' contention that Section 2018 limits the general condemnation authority of AEC is, at best, tenuous. The contention that Section 2018 prohibits AEC from constructing this transmission line contrary to local ordinances is obviously an argument which would receive more serious consideration if urged in connection with an injunction or similar proceeding directed to the method of construction and operation of this line.

Appellee, however, is most anxious to avoid further delay in this matter; wherefore, appellee, as it stated in the Court below, does not desire to do more than inform the Court that it is aware of this situation and is willing to waive this position or argument and

proceed to meet the merits of appellants' objections, with a respectful request that the Court do likewise.[8] However, in order for the Court to reach appellants' objections here, it is submitted that certain additional facts must be furnished. Appellee, therefore, is willing to make the same assumptions, arguendo, that it made in the Court below, i.e., that:

(1) The AEC will proceed to construct this transmission line without applying for a use permit from either the County of San Mateo or the Town of Woodside.[9]

(2) That AEC will construct an overhead transmission line on the easement condemned; and

(3) That the actions of the Town of Woodside in effecting a temporary ordinance immediately prior to this condemnation prohibiting overhead transmission lines and that of the County of San Mateo in revoking a use permit previously approved for this line, were in good faith and not

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[8]It is imperative to the AEC that power be available to this project in the immediate future in that construction has almost been completed. Obviously a complex of this size without the necessary power to operate it will be almost completely useless. Wherefore, AEC does not desire that this matter be determined on a technicality which may afford an opportunity for further delay in a collateral proceeding. It is the desire of appellee that this matter be set to rest at this time.

[9]It is to be noted here that the City of San Mateo has no ordinance requiring that transmission lines be placed underground. Thus, in order to be deemed in violation of a San Mateo ordinance concerning transmission lines, it must be presumed that AEC will not apply for a use permit required by Section 6500(b) of the San Mateo County Ordinances.

solely for the purpose of attempting to come within the purview of Section 2018.[10]

Turning now to the format of this brief, counsel for appellee, in attempting to organize argument herein, found it almost impossible to present an orderly and cogent argument which concurrently presented appellee's position and refuted that expressed in appellants' brief (it is suggested that this difficulty is due to appellants' propensity to discuss everything but the basic issue here concerned); wherefore it was concluded that it would be best to first present the Court with appellee's reasoning and authorities in support of its position and to thereafter devote a separate part to rebutting pertinent sections of appellants' brief. This, then, is the procedure followed herein.

PART I

ARGUMENT IN SUPPORT OF APPELLEE'S POSITION

A. Agencies of the Federal Government are not subject to state or local control unless Congress has so decreed.

The Federal Government's sovereign power of eminent domain is in no way subject to the will or consent of a state or local governmental body.

It has not been seriously contended during the argument that the United States government is

[10]In this latter connection it must be emphasized that appellee is of the opinion that much could be said concerning the circumstances and effect of these actions by appellants County of San Mateo and the Town of Woodside. Such a discussion, however, would unduly lengthen and complicate the present proceedings, and is really unnecessary for a determination of the present issue.

without power to appropriate lands or other property within the States for its own uses, and to enable it to perform its proper functions. Such an authority is essential to its independent existence and perpetuity. *These cannot be preserved if the obstinacy of a private person, or if any other authority, can prevent the acquisition of the means or instruments by which alone governmental functions can be performed.* . . . If the right to acquire property for such uses may be made a barren right by the unwillingness of property-holders to sell, or by the action of a State prohibiting a sale to the Federal government, the constitutional grants of power may be rendered nugatory, and the government is dependent for its practical existence upon the will of a State, or even upon that of a private citizen. This cannot be.

* * *

If the United States have the power, it must be complete in itself. It can neither be enlarged nor diminished by a State. Nor can any State prescribe the manner in which it must be exercised. The consent of a State can never be a condition precedent to its enjoyment. (Emphasis supplied)

Kohl v. United States, 91 U.S. 367, 371 (1875);

Also see:

United States v. Carmack, 329 U.S. 230 (1946).

In addition to the supremacy of its eminent domain power, the general sovereign immunity of the Federal Government, its agencies and instrumentalities, from state or local control of its governmental functions is also so clear as to need no lengthy discussion here.

AEC, therefore, as an agency of the Federal Government, wears the cloak of soverign immunity, and as such, its activities are generally deemed free from regulation or control by any state or local governmental body. See e.g.: U.S. Const. Art. VI; *Johnson v. Maryland*, 254 U.S. 51 (1920); *Arizona v. California*, 283 U.S. 423 (1930); *Mayo v. United States*, 319 U.S. 441 (1942).

Obviously, however, it lies within the power of Congress to submit a federal agency to certain regulations or control by a state.

Mayo v. United States, supra, p. 446.

Unquestionably, therefore, the activities of AEC as a United States governmental agency, in connection with the construction and operation of SLAC, are wholly immune from regulation or control by local governmental bodies, *unless* it can be established that Congress has indeed directed that AEC subject itself thereto.

Wherefore, in order to determine whether AEC has been so directed or limited by Congress, it is, of course, necessary to examine and consider the terminology and effect of the Congressional enactments conferring authority upon AEC in the field in question, i.e., the authority to exercise the power of eminent domain and to construct the transmission line in question.

B. Congress has conferred upon AEC broad powers to exercise eminent domain and to construct such facilities as it deems necessary.

A review of the purposes and policies set forth in the Atomic Energy Act of 1954 (Act of August 30, 1954; 68 Stat. 921; 42 U.S.C. Sections 2011-2296; hereinafter referred to as Act of 1954) reveals that Congress determined that the Federal Government, through AEC, was to exercise exclusive control over the development and use of atomic energy and special nuclear material for all purposes (42 U.S.C. Sections 2011-2013). To effectuate this purpose, Congress conferred upon AEC authority to, *inter alia*, license the use of nuclear energy for industrial or commercial purposes (42 U.S.C. Sections 2131-2133); and further, Congress not only authorized AEC to promote and conduct research in the nuclear field, but *directed* that AEC do so (42 U.S.C. Sections 2051-2053).

There can be no question as to AEC's general authority to construct facilities and to exercise the sovereign power of eminent domain in the performance of its function. In this regard, the Court's attention is directed to the following pertinent provisions of the Act of 1954:

> *42 U.S.C. 2201:*
>
> In the performance of its functions the Commission is authorized to
>
> * * *
>
> (e) acquire such material, property, equipment, and facilities, establish or construct such buildings and facilities, and modify such build-

> ings and facilities from time to time, as it may deem necessary . . .
>
> * * *
>
> (g) acquire, purchase, lease, and hold real and personal property, including patents, as agent of and on behalf of the United States . . .

42 U.S.C. 2222:

> Proceedings for condemnation shall be instituted pursuant to the provisions of sections 257 and 258 of Title 40, and section 1403 of Title 28. Sections 258a-258e of Title 40 shall be applicable to any such proceedings.

This broad authority to condemn is further supplemented by the following provision of 40 U.S.C. Section 257:

> In every case in which the Secretary of the Treasury or any other officer of the Government has been, or hereafter shall be, authorized to procure real estate for the erection of a public building or for other public uses, he may acquire the same for the United States by condemnation, under judicial process, whenever in his opinion it is necessary or advantageous to the Government to do so . . .

In addition to the foregoing general authorizations, the statutes which authorized funds for SLAC specifically provide that the money authorized is ". . . for acquisition or condemnation of any real property or facility or for any plant or facility acquisition, construction . . ." (Acts of May 13, 1960 and Sept. 26, 1961, supra).

The Supreme Court, in referring to similar authority conferred by Congress upon the office of the Federal Works Administrator, characterized such broad authority as ". . . a general authorization which carries with it the sovereign's full powers except such as are excluded expressly or by necessary implication." *United States v. Carmack,* supra, at 243.

The issue in the *Carmack* case was also similar to that in the instant case for the Court was there considering whether the Federal Government agencies involved had sufficient statutory authority to condemn the land in question. In upholding the Government's right of condemnation in the circumstances presented, the Court stated, at page 236:

> Far removed from the time and circumstances that led to the enactment of these statutes . . . this Court must be slow to read into them today unexpressed limitations restricting the authority of the very officials named in the Acts as the ones upon whom Congress chose to rely.

1. There is no express limitation upon AEC's authority in the Act of 1954.

Certainly, in the instant case, nothing in the Act of 1954 has been called to the Court's attention, by appellant, which contains an express limitation upon the authority of AEC to condemn this easement or to construct the transmission line facility in question; nor can any such express limitation be found. Wherefore, in order to find some support for their contention, appellants are forced to urge that Section 2018

contains a "necessary implication" that AEC's otherwise broad authority is limited in the present situation. Here then, is the gravamen of this appeal. For it is quite obvious from the foregoing authorities that absent such an implication, AEC is clearly not subject to appellants' local ordinances and can proceed with this condemnation and the construction of the transmission line with complete immunity from local whims and control. It is, of course, appellee's contention, and the lower Court's ruling, that no such "necessary implication" can be found or justified from the provisions of Section 2018; and, it is submitted, the following considerations wholly support appellee's position and the lower Court's ruling.

2. No "necessary implication" limiting AEC's authority can be concluded from Section 2018.

The terminology of Section 2018 is brief and concise—it merely states:

> Nothing in this chapter shall be construed to affect the authority or regulations of any Federal, State, or local agency with respect to the generation, sale, or transmission of electric power.

In attempting to interpret a congressional statute, it is, of course, helpful and proper to consider pertinent legislative history. The legislative history of Section 2018 (originally Section 271 of the Act of 1954) is relatively sparse, but what there is clearly reveals the purpose and intent of Congress in the enactment of this statute. The Court's attention is directed to the following pertinent excerpts from the comments

of Senator Bourke B. Hickenlooper (the Senate sponsor of the Act of 1954) which were made during Senate debate on the proposed provisions of the Act of 1954:

> We take the position that electricity is electricity. Once it is produced it should be subject to the proper regulatory body, whether it be the Federal Power Commission in the case of inter-state transmission, or State regulatory bodies if such exist, or municipal regulatory bodies. We feel that there is no difference and that it should be treated as all other electricity which is regulated by the public.
>
> I call special attention to section 271 of the proposed act, which says:
>
> "Sec. 271. Nothing in this act shall be construed to affect the authority or regulations of any Federal, State, or local agency with respect to the generation, sale, or transmission of electric power."
>
> That is designed to keep the regulatory authority exactly as it is now, traditionally and under the law.
>
> 100 Cong. Rec. 11567, July 26, 1954.

What section 271 does is to make clear that this act does not interfere in any way with the jurisdiction of the Federal Power Commission over such activities or with State agencies where they have jurisdiction, or with local agencies where they have jurisdiction.

It is not an authority given in a negative way. It is a positive negation of any intent by this statute to interfere with the existing laws and the exist-

ing authorities, State and Federal, that have to do with electricity.

* * *

We do not back into it. We are very careful in this bill not to attempt to write into it affirmative law which may have to be interpreted by the courts, but merely to say that the present existing authority shall not in any way be interfered with in the regulation of interstate transmission of electrical energy, in that general field. We make it very clear that we do not disturb existing law.

* * *

These licensees are private operators. They produce electric energy. Whether they produce it partly with uranium, partly with corn cobs, or partly with coal does not make any difference. So far as the fact that they produce electric energy is concerned, that electric energy which goes into interstate commerce is under the control and jurisdiction and regulation of the Federal Power Commission under the proposed act, under section 271.

100 Cong. Rec. 11709, July 27, 1954.

We say that nothing in this act shall interfere with or affect the authority or regulations of any Federal, State or local agency with respect to the generation, sale or transmission of electric power. We say that this act does not interfere with the rights and the power and the authority of any Federal, State, or local regulatory body whatever; and the power and the authority which may be there now for the transmission of electricity or the generation of electricity or whatever the authority may be is not changed.

* * *

There was a move on the part of the committee to put this section 271 in the bill as a safeguard and as an assurance that the existing authority of the Federal Power Commission or the Federal law or agency and the existing authority of the State agencies and the existing authority of local agencies, whatever they may be in connection with the transmission of electric energy, would not be disturbed or interfered with in any way.

100 Cong. Rec. 11710, July 27, 1954.

We say in this act that the same rules and regulations, power and authority of the Federal Government, or of the local and State agencies, that exist now over the transmission of electric energy in interstate commerce shall obtain so far as any licensee is concerned. That is only a precaution. It would obtain if we never had that provision in the law. Even the provision of section 271 is not necessary in the law, in my opinion, for the Federal Government to assume jurisdiction over the transmission of electricity in interstate commerce by a licensee. We put section 271 in there as an assurance that the existing authority is not disturbed.

* * *

There cannot be any dispute under the language of the present bill because it specifically says that this bill does not in any way touch existing authority. That goes right on, and it exists just as it was before. We have gone to the trouble in this act—though I do not think it is necessary—of so stating for clarification.

100 Cong. Rec. 11711-11712, July 27, 1954.

Thus the legislative history of Section 2018 reveals that Congress was obviously concerned that the broad powers being conferred upon AEC to exercise exclusive control over the development and use of atomic energy which, as previously noted, included the right to license the use of nuclear materials for industrial or commercial purposes, might be misconstrued as an authorization to AEC to control all phases and by-products of such activities, such as the right to regulate and control the "generation, sale, or transmission" of electrical energy resulting from the use of nuclear materials. The legislative history further reveals that the clear purpose and intent of Congress in enacting Section 2018 was merely to assure that any electrical energy produced by nuclear means and transmitted for sale or commercial use *from* a nuclear plant would be subject to the same regulatory controls as electrical energy produced by conventional means.

The facts of the instant case do not even fall into the same category as those contemplated by Section 2018. It is to be recalled that the project which gave rise to the present proceedings is a *research* project and it will not, therefore, result in the generation, or transmission, from said project for sale or commercial use, of electrical energy generated by nuclear means. The sole purpose of this condemnation action is to obtain an easement to construct a transmission line which will carry conventionally generated electricity to the project as a utility necessary for its operation.

It must be concluded, therefore, that no "necessary implication," or for that matter, even the slightest

suggestion, can be found from the provisions of Section 2018, or from its legislative history, that Congress intended thereby to limit the authority of AEC to exercise its otherwise broad powers of eminent domain, and to construct such facilities as it deems necessary.

C. Congress has in effect ratified appellee's contentions here.

This Court has recognized that in certain circumstances it can be said that Congress has "ratified" a particular statutory interpretation or construction. In *United States v. Kennedy,* 278 F.2d 121 (C.A. 9, 1960) a question had been raised concerning the authority of the Secretary of the Interior to condemn certain lands in Mount McKinley National Park in Alaska. It was there contended by the landowner that the Secretary of Interior had not been granted specific statutory authority to condemn the land in question. It was the Government's contention, however, that even though Congress had not specifically authorized this particular condemnation, Congress had appropriated to the Secretary of the Interior general acquisition funds with full knowledge of the Secretary's prior practice of utilizing such funds to acquire land not included within the specific authorization statute. In upholding the Secretary of the Interior's authority to condemn in these circumstances, the Court stated: "The fact that Congress continued the same appropriation with knowledge of this administrative understanding and practice, constitutes virtual ratification of the administrative construction." (Id. at p. 126) In accord see: *Boesche v. Udall,* 373 U.S. 472, 483

(1962); *Ivanhoe Irrig. Dist. v. McCracken,* 357 U.S. 275 (1957); *Fleming v. Mohawk Co.,* 331 U.S. 111, 116, 119 (1946); *Brooks v. Dewar,* 313 U.S. 354, 361 (1941); *Swayne & Hoyt, Ltd. v. United States,* 300 U.S. 297, 301-302 (1937).

It is submitted that, in essence, Congress has also "ratified" the Government's present interpretation of Section 2018 as to AEC's authority to condemn this easement and construct the transmission line contrary to local ordinances. In this regard the Court's attention is respectfully directed to the following: The Act of 1954, *inter alia,* continued a congressional committee called the Joint Committee on Atomic Energy which is charged with the authority and duty to:

> . . . make continuing studies of the activities of the Atomic Energy Commission and of problems relating to the development, use, and control of atomic energy. . . . The members of the Joint Committee who are Members of the Senate shall from time to time report to the Senate, and the members of the Joint Committee who are Members of the House of Representatives shall from time to time report to the House, by bill or otherwise, their recommendations with respect to matters within the jurisdiction of their respective Houses which are referred to the Joint Committee or otherwise within the jurisdiction of the Joint Committee. (42 U.S.C. Section 2252)

Pursuant to their authority and duty, the Joint Committee on Atomic Energy, as previously mentioned herein, held a hearing on January 29, 1964 to determine all of the facts concerning the controversy that

had arisen involving this transmission line problem at the SLAC project. Evidence was submitted to the Committee during this hearing by all interested parties so that the members thereof received a full and complete picture of the entire problem. The hearing was subsequently printed and copies thereof are readily available.[11] One of the prominent members of this Committee who was present during the aforesaid hearing, is Congressman Craig Hosmer from California. Congressman Hosmer has been a member of this Joint Committee for many years and was a member during its consideration of the Atomic Energy Act of 1954.[12] Subsequent to the January 29th hearing, during the House Debate on the 1964-65 AEC appropriation bill, Congressman Hosmer informed the Members of the House of Representatives of the facts concerning this problem, including the fact that condemnation proceedings had been instituted. Congressman Hosmer's remarks contain a very helpful and concise statement of the background of this problem. For the Court's convenience, Congressman Hosmer's remarks which appear at pages 9,974 through 9,976 of the Congressional Record-House for May 7, 1964, have been set forth in full in the Appendix hereof. The Court's particular attention, however, is directed to the last portion of Congressman Hosmer's remarks wherein he states:

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[11]Hearing of January 29, 1964, supra.

[12]This Committee was originally established by the Atomic Energy Act of 1946; Act of August 1, 1946, 60 Stat. 772, and merely continued by the Act of 1954.

> The AEC's authority under the Atomic Energy Act of 1954 to acquire a right-of-way by eminent domain is clear. Moreover, the intent underlying the authorization and appropriations acts which provide for the Stanford project, support the Commission's authority in this regard. Some local residents have questioned whether section 271 of the act limits the Commission's authority in this respect. I will simply say that section 271 was intended to apply to regulatory controls over the generation of electricity by nuclear power. It has nothing whatever to do with the present situation.

Obviously, therefore, through the hearing of January 29, 1964, and Congressman Hosmer's report to the House, Congress had been informed of the existence of, and facts concerning, this controversy, including the position of AEC as to their authority to proceed contrary to local ordinances.

Subsequently, Congress proceeded to approve AEC's 1964-65 appropriations wherein Congress authorized general construction funds (which included sums for SLAC), approved certain new projects and other expenditures and then proceeded to specify certain project "limitations" and "rescissions" (Pub.L. 88-332, approved June 30, 1964, 78 Stat. 227; Pub.L. 88-511, approved August 30, 1964, 78 Stat. 682). None of the limitations or rescissions contained in the 1964-65 appropriation act are directed to this transmission line facility or any other aspect of the SLAC project.

It is submitted, therefore, that in these circumstances it can and should be concluded that Con-

gress has "ratified" the contention that Section 2018 is not applicable to the present situation and that AEC has full power and authority to proceed with this condemnation and the construction of the transmission line in question.

PART II

REBUTTAL OF APPELLANTS' ARGUMENT

INTRODUCTION

As stated at the outset of this Brief (Introduction, supra) appellee is of the firm belief that much of appellants' brief contains "arguments" or "issues" which are wholly irrelevant to the sole issue presented in this appeal; wherefore, it is suggested that a detailed rebuttal of all the minor points raised or discussed in appellants' argument would be of mere academic interest and would be of little assistance to the Court's deliberation upon the issue here concerned. In view of this belief, then, counsel for appellee, in the discussion to follow, has attempted to minimize comment as to those portions of appellants' argument which it is felt are not relevant to the issue.

A few general comments concerning the format of appellants' brief might be helpful at this point. The argument portion of appellants' brief appears to commence with Part III (Br. 7-25) and proceeds through Part IV (Br. 25-28). The argument appears to be divided into two main parts, designated Part III and Part IV, each with several sections. This rebuttal will attempt to follow the aforesaid format.

A. Part III of appellants' brief.

1. Section A (Br. 7-9).

This portion of appellants' brief discusses an alleged "hands-off" policy of Congress with respect to local regulation of electricity. In this regard appellants cite Section 824(b) of the Federal Power Act of 1935 (16 U.S.C. Sections 791-828) and two cases which discuss the Federal Power Act.[13] This is one of the portions of appellants' brief which appellee deems to be irrelevant to the issue here. Appellee can in no way perceive how a discussion of the jurisdiction of the Federal Power Commission over interstate electrical facilities can be pertinent to a resolution of the issue of whether AEC's authority is in this case limited by 42 U.S.C. Section 2018.

2. Section B (Br. 9-13).

Appellants here merely set forth a portion of the legislative history of Section 2018, and then conclude therefrom that ". . . it is clear that Congress was satisfied with, and intended to continue, undisturbed, *existing State and local authority* over all electricity, including that produced by atomic means." (Br. 12. Emphasis supplied)

Rather conspicuous by its omission from appellants' conclusion here is any reference not only to the intent

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[13]One of the cases cited by appellants is *Southern Cal. Edison Co. v. Federal Power Commission*, 310 F.2d 784, a 1962 decision of this Court. Although appellee does not believe the decision and appellants' discussion thereof to be pertinent to this case, it should be noted that appellants erroneously report that certiorari had been denied. In fact, the Supreme Court not only granted certiorari (372 U.S. 958), but they *reversed* this Court's decision at 376 U.S. 205 (1964).

but the specific statement of Congress to preserve ". . . the authority of any *Federal,* State or local agency with respect to the generation, sale or transmission of electric power." (Emphasis supplied. 42 U.S.C. Section 2018; also see many references thereto in the legislative history of Section 2018, Part I, Section B, subsection 1, supra.)

It is submitted that appellee's discussion hereinabove of the history, intent and purpose of Section 2018 clearly establishes its inapplicability to the present case (Ibid).

3. Section C (Br. 13-16).

This section of appellants' brief contains a rather strange discussion which is ostensibly designed to persuade the Court of the desirability and practicability of placing the transmission line here in question underground. In the process of this discussion appellants cite many decisions of various state courts and quasi-judicial bodies.

Certainly, there can be no doubt that the question of whether this AEC transmission line should be overhead or underground is not before this Court under any theory. The only issue here is whether AEC is bound by local ordinances in this proceeding, whatever those ordinances might direct. The fact that the Court may or may not agree with the intent and purpose of the ordinance is obviously immaterial.

Mention should also be made that since this is a Federal condemnation proceeding, it is governed solely by Federal law and the state decisions and statutes

cited by appellants in their brief are neither controlling nor persuasive. *United States v. 93.970 Acres of Land,* 360 U.S. 328 (1959); 3 Barron & Holtzoff, Fed. Prac. & Proc., Section 1516, p. 326 of 1964 Supplement.

In the last paragraph of this portion of appellants' brief (Br. 16) appellants make reference to *United States v. Oklahoma Gas and Electric Co.,* 297 F. 575 (CA 8, 1924), and state that, in effect, the Government's position there was nearly identical with that taken in this case. Aside from the fact that the *Oklahoma* decision is, in all likelihood, no longer valid law (cf. *Public Utilities Commission of California v. United States,* 355 U.S. 534 (1957); and *Paul v. United States,* 371 U.S. 245 (1962)) it is submitted that no similarity exists whatsoever between the *Oklahoma* case and the instant case. The *Oklahoma* case involved a contract between the Federal Government and a public utility for electrical energy to be supplied to a Government facility; it did not involve a question of the authority of the Government to condemn or to construct a portion of the Government facility itself, as is the fact in the instant case.

As stated several times hereinabove, SLAC is *not* a nuclear plant designed for the purpose of generating and selling electricity. Wherefore, AEC has no intention whatsoever of interfering with the normal regulation and control of commercial electricity by the proper regulatory bodies, local or Federal; in fact, AEC's contract with PG&E specifically provides for approval by the California Public Utilities Commis-

sion (R. Vol. 1a 32). Likewise, however, AEC is not bound to and has no intention of submitting its own activities, incident to SLAC, to the jurisdiction of any such local regulatory bodies.

4. Section D (Br. 16-19).

This portion contains a discussion of a series of cases which appellants allege uphold the contention that ". . . the burden of additional cost to the Government by reason of local regulations would not cause such regulations to be inapplicable" (Br. 17). The reference to cost pertains, of course, to the fact that an underground line in the instant case would cost several million dollars more than an overhead line.

The cases cited in this portion of appellants' argument, with the exception of *Paul v. United States,* supra,[14] all concern factual situations involving activities of contractors doing business with the Federal Government. The United States, or an agency or instrumentality thereof, is not a party to any of the cases here relied upon by appellants. The Courts, even in the very cases cited by appellants, have consistently recognized the distinction between state regulation of contractors doing business with the Federal Government and attempted regulation of an agency, officer or instrumentality of the Federal Government itself. In discussing this distinction, the Court, in *Penn Dairies, Inc. v. Milk Control Commission of Pennsylvania,* 318 U.S. 261 (1942), cited by appellants at page 17 of their brief, stated at page 269:

[14]As appellants admit (Br. 17), the decision in the *Paul* case does not really support their present contention.

> We may assume also that, in the absence of Congressional consent, there is an implied constitutional immunity of the national government from state taxation and from state regulation of the performance, by federal officers and agencies, of governmental functions. *Ohio v. Thomas,* 173 U.S. 276; *Johnson v. Maryland,* 254 U.S. 51; *Hunt v. United States,* 278 U.S. 96; *Arizona v. California,* 283 U.S. 423. But those who contract to furnish supplies or render services to the government are not such agencies and do not perform governmental functions.

Likewise, in the next case cited by appellants (Br. 17), *James Stewart & Co. v. Sadrakula,* 309 U.S. 94 (1939), the Court said at pages 103-104:

> But the authority of state laws or their administration may not interfere with the carrying out of a national purpose. Where enforcement of the state law would handicap efforts to carry out the plans of the United States, the state enactment must, of course, give way.

An excellent discussion of these cases and the distinction to be applied between contractors doing business with the Federal Government and agencies of the Federal Government itself appears in the recent case of *Public Utilities Commission of California v. United States,* supra. This case involved a California statute to be enforced by the Public Utilities Commission of California, which, among other things, attempted to regulate Federal negotiating practices concerning rates for the shipment of Government property within the State. In deciding that the Federal Government

was immune from such control, the Court reviewed the cases concerning sovereign immunity in these circumstances, and in so doing stated, at pages 543-4:

> The question is whether California may impose this restraint or control on federal transportation procurement.
>
> We lay to one side these cases which sustain nondiscriminatory state taxes on activities of contractors and others who do business for the United States, as their impact at most is to increase the costs of the operation. See, e.g., *Esso Standard Oil Co. v. Evans,* 345 U.S. 495; *Smith v. Davis,* 323 U.S. 111; *Alabama v. King & Boozer,* 314 U.S. 1; *James v. Dravo Contracting Co.,* 302 U.S. 134. We also need do no more than mention cases where, absent a conflicting federal regulation, a State seeks to impose safety or other requirements on a contractor who does business for the United States. See, e.g., *Baltimore & Annapolis R. Co. v. Lichtenberg,* 176 Md. 383, 4 A. 2d 734, appeal dismissed, 308 U.S. 525; *James Stewart & Co. v. Sadrakula,* 309 U.S. 94. *Penn Dairies v. Milk Control Comm'n,* 318 U.S. 261, can likewise be put to one side. There the question, much mooted, was whether the federal policy conflicted with the state policy fixing the price of milk which the United States purchased. The Court concluded that the state regulation "imposes no prohibition on the national government or its officers." Id., at 270. Here, however, the State places a prohibition on the Federal Government. Here the conflict between the federal policy of negotiated rates and the state policy of regulation of negotiated rates seems to us to be clear. The conflict is as plain as it was in *Arizona v.*

California, 283 U.S. 423, 451, where a State sought authority over plans and specifications for a federal dam, in *Leslie Miller, Inc. v. Arkansas,* supra, where state standards regulating contractors conflicted with federal standards for those contractors, and in *Johnson v. Maryland,* 254 U.S. 51, where a State sought to exact a license requirement from a federal employee driving a mail truck. The conflict seems to us to be as clear as any that the Supremacy Clause, Art. VI, cl. 2, of the Constitution was designed to resolve. As Chief Justice Marshall said in *McCulloch v. Maryland,* 4 Wheat. 316, 427,

> "It is of the very essence of supremacy to remove all obstacles to its action within its own sphere, and so to modify every power vested in subordinate governments, as to exempt its own operations from their own influence."

It is obvious, therefore, that since we are here concerned with the direct activities and functions of the Federal Government itself, through its agency the AEC, the cases cited by appellants in this portion of their brief are wholly inapplicable to the present issue.

5. Section E (Br. 19-21).

This section has two subdivisions. Subdivision (1) thereof discusses Section 2021(k) of 42 U.S.C., which appellants allege indicates Congressional intent to closely limit the powers of AEC (Br. 19). Section 2021 is clearly devoted to a consideration of a rather unique problem associated with the use of nuclear materials—radiation hazard. Section 2021 authorizes and directs AEC to assume certain responsibility and

regulation, in cooperation with the States, to insure adequate public protection from radiation hazards incident to the use of nuclear materials. Here again Congress was obviously concerned that the broad powers conferred upon AEC in the field of radiation hazard might be misconstrued. Wherefore, to make it absolutely clear that the regulatory authority granted to AEC by Section 2021 was directed solely to radiation hazards and not to other functions of private or state owned facilities utilizing nuclear material under license from AEC, Congress stated, in part (k) of Section 2021:

> Nothing *in this section* shall be construed to affect the authority of any State or local agency to regulate activities for purposes other than protection against radiation hazards. (Emphasis supplied)

Since the present case does not involve a question of radiation hazard or the regulatory powers of AEC pursuant to Section 2021—appellee fails to see the relevancy of Section 2021(k) to the present issue.

Appellants allege, in subsection (2) of this section E, that ". . . there is evidence in the statutory history that Congressional approval was predicated on the ability to build the center [SLAC] without condemnation" (Br. 21).

This bare allegation is unsupported by argument or authority and is predicated solely upon some innocuous statement made by a witness in one of the many Congressional hearings on this proposed project. Here again we have an example of one of the many "issues" which have been sprinkled into appellants'

brief. It is submitted that the absurdity of this "issue" is so self-evident as to need no further comment.

6. Section F (Br. 22-25).

In this section appellants contend that Congress has ". . . enacted positive legislation supporting the purposes of local legislation preserving open spaces and scenic beauty" (Br. 22). Appellants then proceed to discuss several other Congressional statutes totally unrelated to the activities and authority of AEC. The whole point of this discussion by appellants seems to be directed to an attempt to come within the purview of the Supreme Court decision in *Huron Cement Co. v. Detroit,* 362 U.S. 440 (1959), cited and discussed by appellants at page 24 of their brief.

It is certainly true that the Supreme Court, in the *Huron* case, did hold that a private corporation engaged in operating ships owned by it, but Federally licensed, was subject to a municipal ordinance on air pollution while its ships were docked within the municipal boundaries; *but,* in so holding, the Court specifically found: (a) ". . . there is no overlap between the scope of the federal ship inspection laws and that of the municipal ordinance here involved" (at p. 446); and, (b) "The mere possession of a federal license, however, does not immunize a ship from the operation of the normal incidents of local police power, not constituting a direct regulation of commerce" (at p. 447).

Appellants are obviously once again trying very desperately to circumvent the fact that we are here

concerned with the direct activity of AEC, an agency of the Federal Government that clearly *does* have immunity from local regulation.

B. Part IV of appellants' brief.

1. Section A (Br. 26-27).

Appellants here contend that Congress may, by statute, limit the authority of a Federal agency to exercise the power of eminent domain; this is one of the very few contentions in appellants' brief with which counsel for appellee can agree! Appellants, however, then proceed to discuss the recent decision in *Maiatico v. United States,* 302 F.2d 880 (CA DC 1962) and they attempt to draw an analogy between the facts and statutes in that case and those in the instant one.

The *Maiatico* case involved a condemnation by the General Services Administration of an office building within the District of Columbia. Due to the unique situation presented by the number of public buildings existing and the obvious need for future public buildings within the geographic limitations of the District of Columbia, Congress had enacted certain enabling statutes which placed very strict conditions and limitations upon the purchase or acquisition of property by GSA within the District of Columbia. Without going into all the details of the statutes concerned and the various contentions proffered in the *Maiatico* case, suffice it to say that the Court there found that even though Congress had authorized a general ap-

propriation to GSA for public buildings within the District of Columbia, GSA was not thereby excused from the conditions and requirements of other pertinent statutes, which included the requirements of prior approval by the Committee on Public Works of the House and Senate and location within a specified "taking area."

Appellants suggest an analogy between the instant case and the strict limitations and conditions imposed by Congress upon acquisitions within the District of Columbia; appellants, however, are unable to point to any statute, pertaining to the authority of AEC, which contains any such specific conditions or limitations upon the otherwise broad powers of eminent domain conferred upon AEC by Congress. The reason for this omission in appellants' argument is obvious—there have been no such conditions or limitations imposed upon AEC's authority to exercise the sovereign power of eminent domain. The *Maiatico* case is clearly inapplicable here.

2. Section B (Br. 27-28).

In this last portion of their argument appellants set forth a rather confused or confusing discussion of an alleged "issue" of public use. Appellee submits that the record in this matter establishes unequivocally that there is no such issue here presented for determination. As stated several times hereinabove, the *sole* issue here concerns an alleged limitation upon AEC's *authority* to condemn this easement and to construct the transmission line thereon.

CONCLUSION

It is submitted that the pertinent facts in this matter can be very briefly summarized as follows:

Pursuant to the express direction and authority of Congress, AEC is currently in the process of constructing a $114 million nuclear *research* complex upon the campus at Stanford University. Because of what AEC deems to be unreasonable demands by local governmental bodies, conventional electrical power cannot be supplied to this complex by the local utility company in a manner and for a cost which, in the opinion of AEC, is in the best national interests. Wherefore, as clearly authorized by Congress, AEC has found it necessary to exercise its discretion and has called upon the sovereign powers of immunity and eminent domain to accomplish the requisite purpose of providing electrical power to this project.

It is likewise submitted that the law applicable to these facts can also be briefly summarized as follows:

Congress has established AEC as an agency of the Federal Government to perform certain well defined functions of the Federal Government. To this end Congress has conferred upon AEC full and *unrestricted* power of eminent domain. The applicable law in these circumstances has been clearly and concisely stated by the Supreme Court in *Mayo v. United States,* supra, at p. 445:

> Since the United States is a government of delegated powers, none of which may be exercised throughout the Nation by any one state, it is

necessary for uniformity that the laws of the United States be dominant over those of any state. Such dominancy is required also to avoid a breakdown of administration through possible conflicts arising from inconsistent requirements. The supremacy clause of the Constitution states this essential principle. Article VI. A corollary to this principle is that the activities of the Federal Government are free from regulation by any state. No other adjustment of competing enactments or legal principles is possible.

Wherefore, it is respectfully submitted that the Order of the lower Court upholding AEC's right to exercise the power of eminent domain in these circumstances, and to construct the necessary transmission line contrary to local ordinances should be affirmed.

Respectfully submitted,

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CERTIFICATE OF COUNSEL

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

CHARLES R. RENDA
Attorney for Appellee

(Appendix Follows)

Appendix.

Appendix

REMARKS OF CONGRESSMAN CRAIG HOSMER AS CONTAINED IN 110 CONGRESSIONAL RECORD—HOUSE, 9974-76 FOR MAY 7, 1964.

Mr. Hosmer. Mr. Chairman, I would like to say a few words about a proposal to require the AEC, at its own expense, to transmit electric power for the operation of the Stanford accelerator by means of underground transmission lines. The facts can be set forth plainly and clearly. I believe that after the facts have been stated, calm reason and good judgment will lead reasonable men to reject this proposal.

Background of the Stanford Linear Accelerator

First, I would like to say a word about the background of the Stanford project. The Stanford linear accelerator was authorized by Congress in 1961 at an estimated total cost of $114 million. The accelerator is now under construction on the campus of Stanford University at Palo Alto, Calif. When completed in 1966, it will be the highest energy linear accelerator in the world.

The Stanford accelerator will be a unique research facility which qualified scientists throughout the United States and the world will employ in their search for the most fundamental knowledge of nature's basic building blocks. We expect that this facility will contribute to man's understanding of the fundamental physical aspects of the universe. It should do much to enhance the scientific and technological stature of the United States.

Although its initial construction costs will be about $114 million, it is expected that $20 million a year will be spent in the operation of this facility. A staff of approximately 700 will be required to run it. I believe I have said enough to indicate that the very presence of this facility, from the standpoint of prestige and economic value, will be a major asset to this area of the Nation.

Electric Energy Requirements

The Stanford accelerator will require large amounts of electrical energy, not only for the operation of the accelerator itself, but for many items of auxiliary equipment that are associated with the research to be conducted at the facility. In its initial stages, approximately 80,000 kilowatts of electric energy will be required. Ultimately, if it is used at its full design level, up to 300,000 kilowatts may be required.

In January 1963, the Pacific Gas & Electric Co. signed an agreement with the AEC to furnish electrical power for the construction and operation of the accelerator complex. Rates and terms were agreed to, all of which were conditioned on the utility's construction of an overhead transmission line which the company planned to build to the accelerator center. The estimated cost of this transmission line—a cost which would be picked up by the AEC in its rate payments—was $668,000. The lines were to consist of two 300-megawatt circuits which would provide all the power the accelerator might require, plus the insurance of a backup circuit if the power over one circuit was interrupted. I would like to stress again that the cost

for constructing this transmission line, which will satisfy all of the foreseeable requirements for the accelerator complex, is $668,000.

Shortly after the agreement with P.G. & E. was signed in January 1963, a problem developed in the community. Great pressures were exerted on the AEC by local residents to get the AEC to consent to the idea of building underground transmission lines. Applications by P.G. & E. for the construction of overhead transmission lines were repeatedly delayed by the city of Woodside and the county of San Mateo. Finally, the community action took the form of a complete refusal to permit P.G. & E. to serve the project unless this was done by an underground transmission line, for which the AEC would have to bear the extra cost.

Key Facts in the Dispute

I would like to clearly set forth the basic facts involved in this dispute between the local residents of Woodside, Calif., and the Atomic Energy Commission:

First, it must be borne in mind that the best electrical service from the standpoint of the project's needs happens also to be the cheapest. Steel towers with two 300-megawatt circuits would cost about $668,000. This is not the prettiest installation—but it is the cheapest and the best.

Second. Over the past 5 months, the AEC has tried to negotiate a reasonable settlement of this problem with the local communities. AEC indicated that it would be willing to agree to a more attractive, al-

though more expensive, single pole overhead transmission line. The AEC even agreed to an underground line and to make a reasonable contribution to the extra cost entailed if the local communities would also make a substantial contribution to the extra cost involved. The AEC made this offer despite the fact that such a line would be considerably less beneficial to the project than an overhead line, in terms of power and reliability.

Third. Now, what cost differentials are involved between overhead and underground transmission lines?

First, consider the originally planned installation and twin 300-megawatt overhead transmission lines. As I have noted already, it would cost about $668,000. If placed underground, the same lines are estimated to cost $6,440,000.

There is a less adequate overhead installation with only a single 300-megawatt line which the AEC was willing to accept as a compromise. That would cost $992,000. An equivalent underground line would cost $3,644,000.

Finally, the AEC was willing to consider an underground line of 180 megawatts which might only satisfy the minimum needs of the project for the first few years of its operation. Such a line was estimated to cost $2,640,000. Nevertheless, the AEC was willing to contribute to the extra cost involved if others would also bear a substantial part of the additional cost. No such compromise was acceptable to the officials of the town of Woodside and San Mateo County.

Fourth. Now, let us talk for a moment about the so-called conservation issue involved in this dispute. The proposal for the construction of overhead transmission lines has been variously characterized as "debauchery of the landscape" and "desecration" of one of nature's last undisturbed areas.

I have traveled on several occasions in the area surrounding the Stanford campus. It is one of the loveliest areas of California and perhaps the Nation. One finds many beautiful homes placed on 3-acre minimum lots.

However, I also saw overhead transmission lines in the same area. As a matter of fact, I have been informed that between the date of its incorporation in 1957 and June 1963, 251 new wooden power poles were erected within the town of Woodside. From June 1963 to March 25, 1964, 26 additional poles were constructed. These new poles supplement 1,430 overhead power poles now within the city of Woodside. It is thus apparent that overhead transmission lines are no stranger to the residents of Woodside, Calif.

I would also like to call to the attention of the Members a letter from Dr. W. K. Panofsky, who is the director of the Stanford Linear Accelerator Center. Dr. Panofsky is himself deeply interested in conservation matters and states that he is a member of the Sierra Club—a prominent conservation organization in California. Nevertheless, Dr. Panofsky, in a recent letter to Senator Kuchel, a copy of which was furnished to the Joint Committee, stated:

> I feel compelled to inform you that from the point of view of the disturbance of the landscape, the case made by the Woodside residents is a weak one; moreover, I cannot see how it can be considered a conservation issue at all. Under no circumstances can I see any justification in the actual situation for such terms as "debauchery of the landscape" "desecration," etc.

Finally, I would like to stress that the construction of overhead transmission lines to the Stanford project will involve the construction of only five additional poles through the city of Woodside. In short, Mr. Chairman, there really is no conservation issue here at all. The question is: "Is it worth a $2 to $5 million outlay by the Federal Government so that a few residents of a local community may enjoy an unhampered view of a horizon which is already cluttered with well over 1,500 electric energy transmission poles?"

Fifth. Finally, I would like to say a word about the precedent involved here. Keep in mind that there are no underground transmission lines in the town of Woodside or in the unincorporated areas of San Mateo County. There may be some underground distribution lines but these are much less costly than underground transmission lines. As a matter of fact, transmission lines are generally placed underground only in large cities.

If the Federal Government were forced by these local jurisdictions to adopt practices which are much more costly than those conforming to community, regional, or even national standards, then I can foresee

other communities attempting to force the Federal Government into the same posture. How will we justify the construction of overhead transmission lines to service future Federal facilities when the local residents near those facilities can point to Woodside and say, "See what you did for the people of Woodside —we demand at least equal treatment." I do not think that we are ready for this kind of a run on the Federal Treasury.

Background of Joint Committee Interest

The Joint Committee on Atomic Energy has had a longstanding interest in the Stanford project. Indeed, at one point the committee held up authorization of the project so that its cost estimates could be refined and sharpened.

In connection with the present dispute, the committee held hearings on January 29, 1964, at which all of the interested parties were afforded an opportunity to testify. All the facts were brought out at this hearing. In addition, the members of the AEC, the city of Woodside, the county of San Mateo, and Stanford University. Moreover, members of the Joint Committee have actually been out to the site to look into the situation first hand. This hearing entitled "Stanford Accelerator Power Supply" has since been printed and is available.

In our view, the Atomic Energy Commission has been sympathetic and reasonable in its efforts to negotiate a fair settlement.

When faced with the adamant attitude of the local officials, the AEC could do nothing but act under the authority granted by the Atomic Energy Act of 1954, as supplemented by the AEC authorization and appropriation acts, to acquire a right-of-way by eminent domain so that the Government could build a transmission line to bring power to the accelerator. The AEC's authority under the Atomic Energy Act of 1954 to acquire a right-of-way by eminent domain is clear. Moreover, the intent underlying the authorization and appropriations acts which provide for the Stanford project, support the Commission's authority in this regard. Some local residents have questioned whether section 271 of the act limits the Commission's authority in this respect. I will simply say that section 271 was intended to apply to regulatory controls over the generation of electricity by nuclear power. It has nothing whatever to do with the present situation.

Mr. Chairman, I believe that I have set forth the facts as clearly as I can. I shall be opposed to this proposal and I believe that on the basis of the facts in this case, others should arrive at a like judgment.